

Section 29 Case Meeting

18 May 2020

157-197 Buckingham Palace Road, London SW1W 9SP



Members present

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority
Mark Stobbs, Director of Scrutiny & Quality, Professional Standards Authority
Graham Mockler, Assistant Director of Scrutiny & Quality, Professional Standards Authority

In attendance

Peter Mant, Counsel, 39 Essex Street Chambers

Observers

Rachael Martin, Scrutiny Team Coordinator, Professional Standards Authority
David Martin, Concerns & Appointments Officer, Professional Standards Authority
Natasha Wayne, Policy Advisor, Professional Standards Authority
Remi Gberbo, Lawyer, Professional Standards Authority
Rebecca Senior, Lawyer, Professional Standards Authority

1. Definitions

- 1.1 In this meeting note, standard abbreviations have been used. Definitions of the standard abbreviations used by the Authority, together with any abbreviations used specifically for this case are set out in the table at Annex A.

2. Purpose of this note

- 2.1 This meeting note records a summary of the Members' consideration of the relevant decision about the Registrant made by the regulator's panel, and the Authority's decision whether or not to refer the case to the court under Section 29 of the Act.

3. The Authority's powers of referral under Section 29 of the Act

- 3.1 The Authority may refer a case to the relevant court if it considers that a relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.
- 3.2 Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:
 - to protect the health, safety and well-being of the public

- to maintain public confidence in the profession concerned, and
- to maintain proper professional standards and conduct for members of that profession.

3.3 This will also involve consideration of whether the Panel's decision was one that a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could not reasonably have reached; or was otherwise manifestly inappropriate having regard to the safety of the public and the reputation of the profession (applying *Ruscillo*¹).

4. Conflicts of interest

4.1 The Members did not have any conflicts of interest.

5. Jurisdiction

5.1 The Legal Advisor confirmed that the Authority had jurisdiction to consider the case under Section 29 of the Act. Any referral in this case would be to the High Court of Justice of England and Wales and the statutory time limit for an appeal would expire on 19 May 2020.

6. The relevant decision

6.1 The relevant decision is the Determination of the Panel following a hearing which concluded on [REDACTED].

6.2 The Panel's Determination which includes the charges and findings is set out at Annex B.

7. Documents before the meeting

7.1 The following documents were available to the Members:

- Determination of the panel dated [REDACTED]
- The Authority's Detailed Case Review
- Transcript of the hearing dated [REDACTED]
- Counsel's Note dated 18 May 2020
- Registrant's Bundle
- Final Exhibits Bundle
- Case Examiners' Documents
- The NMC's Indicative Sanctions Guidance
- The Authority's Section 29 Case Meeting Manual

¹ CRHP v Ruscillo [2004] EWCA Civ 1356

7.2 The Members and the Legal Advisor were provided with a copy of a response from the NMC to the Authority's Notification of s.29 Meeting. The Members considered the response having received legal advice and after they reached a conclusion on the sufficiency on the outcome.

8. Background

8.1 The Registrant, a nurse, self-referred to the NMC in [REDACTED] in relation to a conviction of fraud by false representation she received in [REDACTED] following a prosecution by [REDACTED] (the council).

8.2 The Registrant has four previous convictions for dishonesty offences from [REDACTED] relating to claims/failures to notify change of circumstances for benefits she was not entitled to. The NMC took no regulatory action in relation to these convictions.

8.3 The circumstances of the offence which the Registrant self-referred were that in [REDACTED] the Registrant made a 'right to buy application' in relation to a council house. The right to buy scheme (the scheme) allows secured tenants of local authorities to buy their houses at a price lower than market value. A tenant must have lived at the property for more than three years and must use it as their principal home in order to qualify.

8.4 In this case, had the application been successful, the Registrant would have been the recipient of a discount of over £44,000, 66% less than the market rate for the property.

8.5 The Registrant was assigned the property as a sole tenant in [REDACTED]. The property was under the control of the council, to whom the application was made. The lease was renewed in [REDACTED] with the Registrant as sole tenant and was non-transferable.

8.6 The Registrant was dishonest in her application as she claimed the property was her sole residence. In fact, the Registrant lived in privately rented accommodation as a joint tenant with her partner. The Registrant had been renting privately since [REDACTED].

8.7 The property had been occupied by the Registrant's son and his family. He moved into the property in [REDACTED] and paid the rent on the property from [REDACTED] until [REDACTED] when the tenancy was ended.

8.8 The Registrant was first interviewed under caution on [REDACTED]. She claimed that she had made the application to query whether she was eligible for the scheme and had not made any decisions as to whether she wished to buy the property. This claim was rejected by the Court. The Registrant was convicted and sentenced on [REDACTED] to 18 months imprisonment suspended for 24 months (expiring [REDACTED]). She was also required to undertake rehabilitation activities and unpaid work for 80 hours. Costs of [REDACTED] were also ordered, as was a victim surcharge of [REDACTED].

8.9 The Panel found the facts proved and the Registrant impaired on public interest grounds and were not satisfied that the Registrant would not be dishonest again

due to her ‘*apparently limited understanding as to what dishonesty is*’. A 12-month suspension with a review was imposed. The Panel also made a number of recommendations in terms of evidence which would assist a future reviewing Panel.

9. Applying Section 29 of the 2002 Act

- 9.1 The Members considered all the documents before them and received legal advice.
- 9.2 The Members discussed the following concerns about the decision:

The previous convictions

The Members noted that the NMC had not taken any action about the Registrant’s previous convictions. It found this surprising but did not consider that, given the time lapse, it would have been appropriate to include these in the charges. It noted that the information was before the Panel and had been taken into account.

Did the Panel fail to apply the NMC’s Sanctions Guidance and/or depart from it without cogent reasons?

- 9.3 The Members considered whether the Panel erred in its approach when considering sanction and whether it gave sufficient reference to the Sanctions Guidance (SG). The Members noted the paragraph in the SG referring to ‘Cases involving Dishonesty’ and dishonesty which is most likely to call into question whether a nurse or midwife should be allowed to remain on the register. This included premeditated, systematic or longstanding deception. The Members considered the Registrant’s conduct premeditated and against the backdrop of her previous convictions could be perceived as longstanding deception. However, Members also noted that the Registrant’s conduct also fell under some of the criteria in the SG under which dishonesty would be considered less serious such as ‘no risk to patients’ and ‘incident in private life of nurse’.
- 9.4 The Members noted that, when considering sanction, the Panel did not give consideration to any lesser sanction than suspension in line with the *Fleischmann*² principle. However, the Members considered that the Panel failed to adequately deal with the suspension guidelines within the SG. Further, whilst the factors considered by the Panel were not unreasonable, the Members felt it was not clear that the Panel did in fact deal with the criteria in the SG sufficiently, particularly given their findings on insight and that this was not an isolated event. The Members concluded that the Panel’s reasoning was poor and they could not be certain that the Panel adequately applied the SG because it had not given sufficient rationale for some of its findings.

Did the Panel’s failure to address “deep-seated personality or attitudinal problems” (i) render its decision on sanction wrong or (ii) lead to a

² CRHP v GDC and Fleischmann [2005] EWHC 87 Admin

situation where the Authority is unable to say whether the decision on sanction was wrong or not?

- 9.5 The Members were concerned that the Panel did not appear to have given regard to the whether the Registrant has a harmful deep-seated attitudinal problem. Whilst the Members agreed with the Panel's finding that the Registrant appeared to show some insight, the level of this was difficult to determine based on the Registrant's evidence. Whilst the Registrant had shown some insight in her reflective statement, it was not clear whether the Registrant's conduct demonstrated deep-seated personality or attitudinal problems, and this required more analysis from the Panel. The Members concluded that the fact that the Registrant repeated offences of a similar nature did potentially indicate deep-seated attitudinal behaviour problems but that her evidence and reflective statement indicated that she was addressing this. It appeared that in suspending the Registrant the Panel was giving her another chance, although this was not explicitly stated by the Panel at the hearing.
- 9.6 The Members concluded that it was not clear whether the registrant did demonstrate deep-seated personality or attitudinal problems and the Panel failed to adequately analyse this. However, given the Registrant's multiple convictions and the Panel's concerns that the Registrant's insight was not full, the Members were considered that this would suggest that the Registrant had deep-seated attitudinal problems. The fact that the Panel had not explored this made it difficult for the Members to understand the Panel's views on this subject.

Did the Panel fail to follow through the full force of its findings at the impairment stage to its decision on sanction?

- 9.7 The Members considered whether there was a fundamental disjunct between the findings at the impairment stage and the sanction imposed given the Panel's findings that there was no mitigation and that the Registrant had limited understanding of what dishonesty is.
- 9.8 The Members did not consider there to be an inconsistency in the Panel's findings and the final sanction imposed but there was a lack of analysis by the Panel of the mitigation. The Members concluded that the Panel's decision lacked reasoning on fundamental incompatibility. It would have expected the Panel to explain why, having made the serious comment about the Registrant's understanding of honesty, it nevertheless did not consider that this was fundamentally incompatible with continued registration.

Were the Panel's reasons for finding that the Registrant's conduct was not fundamentally incompatible with continued registration logically sufficient to justify such a finding

- 9.9 The Members noted that when considering whether the conduct was fundamentally incompatible with continued registration the Panel considered three mitigating factors: remorse; a nursing career spanning 25 years without any nursing concerns being raised; and the Registrant's engagement with the proceedings. The Panel then simply said that removal from the register would be disproportionate and punitive.

- 9.10 Given that this was serious misconduct the Members were not clear that the mitigation identified by the panel was relevant to fundamental incompatibility. They would have expected the panel to have explained in more detail why these overrode a finding that the Registrant still did not understand honesty. It considered that this did not adequately consider the seriousness of the offence and the fact that the Registrant has previous convictions.

Was removal the only reasonable sanction in this case having regard to (i) the seriousness of the misconduct and (ii) the Registrant's limited insight?

- 9.11 The Members considered the Panel's reasoning opaque which did not lead them to conclude that removal was the only reasonable sanction. The Members felt the Panel could have said more about why it was safe to let the Registrant remain on the register and could have referred to the fact that the offence occurred outside clinical practice; the Registrant is clearly a well thought of practitioner given that her employer has stood by her and her reflective statement might suggest that insight could develop. The Members concluded that it was not clear whether this was, in fact, the Panel's reasoning. The Members concluded that there were sufficient grounds on which the Panel could have imposed the suspension but that it gave inadequate reasons as to why it was appropriate.

Conclusion on insufficiency for public protection

- 9.12 The Members were concerned that the Panel's failure to provide clear reasons made it difficult for them to understand the Panel's decision. Nevertheless, despite the Members' concerns about the seriousness of the conviction and that the Registrant displayed a pattern of dishonest behaviour, they noted that the suspension was imposed for the maximum period and the Registrant cannot currently practice. The Members also agreed with the Panel's conclusion that the Registrant's insight was capable of development and were minded that there was mitigation, although minimal, and that the suspension will be reviewed.
- 9.13 The Members therefore concluded that the decision was not one which no reasonable Panel could have made. In all the circumstances, therefore, it was not insufficient for public protection.

10. Referral to court

- 10.1 Having concluded that the Panel's Determination was not insufficient for public protection, the Members were not required to consider whether they should exercise the Authority's power under Section 29 to refer the case to the relevant court.

11. Learning points

- 11.1 The Members agreed that the learning points set out at Appendix C should be communicated to the Regulator.



Alan Clamp (Chair)

17/06/20

Dated

12. Annex A – Definitions

12.1 In this note the following definitions and abbreviations will apply:

The Authority	The Professional Standards Authority for Health and Social Care
The Panel	A Conduct and Competence Committee of the Nursing & Midwifery Council
The Registrant	[REDACTED]
The Regulator	Nursing & Midwifery Council
NMC	Nursing & Midwifery Council
The Act	The National Health Service Reform and Health Care Professions Act 2002 as amended
The Members	The Authority as constituted for this Section 29 case meeting
The Determination	The Determination of the Panel sitting on [REDACTED]
The Court	The High Court of Justice of England and Wales
The SG	Nursing & Midwifery Council’s Indicative Sanctions Guidance in force at sanction stage